# KGL Realty Sdn Bhd & Anor v Asas Dunia Bhd and other applications

HIGH COURT (PULAU PINANG) — CIVIL SUIT NOS 22–322 OF 2000, 22–323 OF 2000 AND 22–324 OF 2000
CHEW SOO HO JC
9 NOVEMBER 2009

*Contract — Sale and purchase of property — Breach — Delay in completion — Defendant failed to deliver vacant possession within stipulated time — Time of essence — Whether plaintiffs entitled to rescind contract — Whether plaintiffs who had absolutely assigned rights and interest in properties to bank had locus standi to issue rescission notices — Whether plaintiffs entitled to relief sought — Contracts Act 1950 s 56(1)*

On 30 May 1995, the defendant entered into a joint venture agreement with Dyner Resources Sdn Bhd ('the landowner') to develop the landowner's land into a commercial project known as Asas Parade ('the project'). KGL Reality Sdn Bhd (KGL) and TSL Properties Sdn Bhd (TSL), two companies in which the shareholders were all the same, entered into 12 sales and purchase agreements ('the SPAs') to purchase a total of 12 units in the project to be constructed by the defendant. Under section 6.08 of the SPA the project was to be completed by the defendant within three years from the date of the SPA. By a loan agreement cum assignment ('LACA') dated 7 December 1996, KGL and TSL assigned all their rights, title and interest in respect of the SPA and the units purchased to the then Hock Hua Bank Bhd, now the second plaintiff. The banking facilities granted by the second plaintiff enabled KGL and TSL to part finance the purchase price for each of the respective units they had purchased from the defendant. The defendant did not complete and deliver vacant possession of all the units purchased by KGL and TSL by the completion date. By reason of the said breach KGL and TSL with the consent of the second plaintiff rescinded the SPA vide notices of termination dated 23 June 1999 and demanded from the defendant the refund of all monies paid by them and by the second plaintiff with interest and solicitors' costs as damages. The defendant argued that the plaintiff need not terminate the SPA because section 7.19 in the SPA had provided indemnity for the delay in completion and that any termination by KGL and TSL would force the defendant to abandon the project. KGL and TSL commenced three separate civil suits against the defendant for the breach of the SPA and the instant judgment was in respect of all three civil suits, which were jointly tried as they involved the same parties. It was KGL and TSL's case that they were entitled to rescind or terminate the SPA pursuant to s 56(1) of the Contracts Act 1950 ('the Act') and claim damages when the defendant

had failed to complete the premises within the three years as stipulated in section 6.08 of the SPA. The defendant submitted that the delay in completion was caused by the economic downturn and argued that it was against public policy for KGL and TSL to terminate the SPA as such termination would have forced the defendant to abandon the project and therefore affect other purchasers who wanted to have the building completed. The defendant further relied on the indemnity clause in the SPA and submitted that it had agreed to pay KGL and TSL liquidated damages for the delay in completion. The main thrust of the defendant's case was that since KGL and TSL had absolutely assigned their rights, titles to and interest in the units purchased to the second plaintiff they had no locus standi to issue the rescission notices and that it should be the second plaintiff bank which had the capacity to pursue its action against the defendant.

**Held**, allowing the plaintiffs' application with costs:

(1) The banks, in the authorities cited by the defendant, were assigned 'all remedies for enforcing' but under the terms of the LACA in the instant case, the second plaintiff bank was not assigned the rights to enforce all remedies. In fact the second plaintiff bank had divested itself from all obligations or liabilities under the SPA, including the enforcement of all remedies, and confined itself to making progress payments out of the facilities granted under the LACA while KGL and TSL remained liable under the SPA to observe all obligations therein including filing any action to enforce the terms of the SPA. Further under section 15.01(c) of the LACA, KGL and TSL covenanted to have the prior consent of the bank in writing before they exercised their right to terminate the SPA. This covenant further strengthened the fact that KGL and TSL had the right to terminate the SPA. After consideration of the LACA and in particular sections 13.01, 14.01 and 15.01 therein it was found that the intention of the parties was explicit, in that, the enforcement of the terms of the SPA would be vested in the hands of KGL and TSL and not with the second plaintiff bank (see paras 11–13 & 15).

(2) Evidence was adduced that the second plaintiff bank had given KGL and TSL oral consent to terminate the SPA. As such, there was no cause for the defendant to complain as the LACA were contracts between KGL, TSL and the second plaintiff and the defendant was not privy to these contracts. In any case, the conduct of the second plaintiff in stopping all releases of KGL and TSL's credit facilities towards any payment to the defendant in relation to the SPA after its termination was consistent with it having consented to the rescission of the SPA. The second plaintiff had also joined action with KGL and TSL to be a party in these suits against the defendant (see paras 16).

(3) The defendant's argument that the termination would have forced them to abandon the project was not true because in spite of the termination of the SPA by KGL and TSL, the latter did not abandon the project but proceeded to build, albeit very slowly. The question of public policy did not arise in these cases where the contractual obligation required the developer to complete the project within the stipulated time frame and not breach the contract in law. The defendant could not be allowed to hide in the cocoon of public policy to defeat the claims of KGL and TSL when they had breached s 6.08 of the SPA. The fact that other purchasers of units in the project would be affected would not be the fault of KGL and TSL but due to the default of the defendant in the performance of their obligations (see paras 17).

(4) When time is of the essence of the contract, as admitted by the defendant and as evidenced in s 6.08 of the SPA, it must be taken as a fundamental term. The breach of a fundamental of a contract must be construed to be a serious breach. Further s 56 of the Act would be applicable to the circumstances of these cases and would render the SPA voidable at the option of KGL and TSL. Thus KGL and TSL were entitled to rescind the SPA. In addition, there was no requirement within s 56 of the Act for KGL and TSL to wait for a reasonable time before they could terminate the contracts. Hence the defendant's contention that KGL and TSL ought to have given reasonable time after the expiration of the completion date before they rescinded the SPA held no merit (see paras 19, 21 & 25).

(5) The completion of the premises in the SPA was solely the obligation of the defendant and the landowner merely allowed its lands to be built. As such, KGL and TSL could sue the defendant and not the landowner, pursuant to the SPA. If the defendant alleged the landowner was jointly liable it could have taken third party proceedings against the landowner, which it did not (see para 26).

(6) KGL and TSL had pleaded and proved those facts of the monies that they had paid and incurred for which they suffered as a consequence of the breach of the SPA by the defendant. As such there was no need for the assessment of damages to be adjourned to another date (see para 28).

**[Bahasa Malaysia summary**

Pada 30 Mei 1995, defendan menandatangani suatu perjanjian usaha sama dengan Dyner Resources Sdn Bhd ('tuan punya tanah') untuk memajukan tanah tuan punya tanah kepada projek komersial dikenali sebagai Asas Parade ('projek tersebut'). KGL Reality Sdn Bhd ('KGL') dan TSL Properties Sdn Bhd ('TSL'), dua syarikat yang mana pemegang-pemegang saham adalah sama, menandatangani 12 perjanjian jual beli ('PJB') untuk membeli

A sejumlah 12 unit dalam projek yang akan didirikan oleh defendan. Di bawah seksyen 6.08 PJB projek tersebut harus disiapkan oleh defendan dalam masa tiga tahun dari tarikh PJB. Menerusi satu perjanjian pinjaman bersama dengan serahhak ('PPS') bertarikh 7 Disember 1996, KGL and TSL menyerahhak semua hak mereka, hak milik dan kepentingan berkaitan PJB
B dan unit-unit yang telah dibeli oleh, pada ketika itu Hock Hua Bank Bhd, yang kini merupakan plaintif kedua. Kemudahan perbankan yang diberikan oleh plaintif kedua membolehkan KGL dan TSL membiayai sebahagian daripada harga belian bagi setiap unit yang telah dibeli daripada defendan. Defendan tidak menyempurnakan dan tidak menyerahkan milikan kosong
C kesemua unit yang dibeli oleh KGL dan TSL pada tarikh penyiapan. Oleh sebab kemungkiran tersebut, KGL dan TSL, dengan kebenaran plaintif kedua, membatalkan PJB tersebut menerusi notis penamatan bertarikh 23 Jun 1999 dan menuntut daripada defendan pemulangan semua wang
D yang telah dibayar oleh mereka dan oleh plaintif kedua dengan faedah dan kos peguamcara sebagai ganti rugi. Defendan berhujah bahawa plaintif tidak perlu menamatkan PJB tersebut kerana seksyen 7.19 PJB memperuntukkan tanggung rugi bagi kelewatan penyiapan dan bahawa apa-apa penamatan oleh KGL dan TSL akan memaksa defendan menghentikan projek tersebut.
E KGL dan TSL memulakan tiga guaman sivil yang berbeza terhadap defendan atas kemungkiran PJB tersebut dan penghakiman ini adalah bagi kesemua guaman sivil itu, yang mana dibicarakan bersama kerana melibatkan pihak-pihak yang sama. Adalah menjadi kes KGL dan TSL bahawa mereka berhak membatalkan atau menamatkan PJB tersebut berikutan s 56(1)
F Akta Kontrak 1950 ('Akta') dan menuntut ganti rugi apabila defendan gagal menyiapkan premis tersebut dalam masa tiga tahun seperti yang diperuntukkan dalam seksyen 6.08 PJB. Defendan berhujah bahawa kelewatan tersebut diakibatkan oleh kemelesetan ekonomi dan berhujah bahawa adalah melanggar polisi awam bagi KGL dan TSL menamatkan PJB
G tersebut kerana penamatan itu akan memaksa defendan menghentikan projek tersebut dan oleh itu menjejaskan pembeli-pembeli lain yang mahukan bangunan tersebut disiapkan. Defendan selanjutnya merujuk kepada klausa tanggung rugi dalam PJB tersebut dan menghujah bahawa defendan bersetuju membayar KGL dan TSL ganti rugi jumlah tertentu atas kelewatan
H penyiapan. Tunjang utama kes defendan ialah memandangkan KGL dan TSL telah menyerahhak hak-hak, hak milik dan kepentingan dalam unit-unit yang telah dibeli secara mutlak kepada plaintif kedua, mereka tiada locus standi untuk mengeluarkan notis pembatalan dan bahawa plaintif kedua yang mempunyai kapasiti untuk meneruskan tindakan terhadap defendan.

I **Diputuskan**, membenarkan permohonan plaintif-plaintif dengan kos:

(1) Bank-bank tersebut, pihak-pihak berkuasa yang disebut oleh defendan, diserahhak 'all remedies for enforcing' tetapi di bawah terma-terma PPS dalam kes ini, plaintif kedua tidak diserahhak hak-hak untuk

melaksanakan kesemua remedi. Malah, plaintif kedua telah melucutkan kesemua kewajipan atau liabiliti di bawah PJB tersebut, termasuklah pelaksanaan semua remedi, dan menghadkan hanya membuat pembayaran ikut kerja daripada kemudahan yang diberikan di bawah PPS tersebut sementara KGL dan TSL tetap bertanggungan di bawah PJB untuk mematuhi semua kewajipan termasuklah memfailkan apa-apa tindakan untuk melaksanakan terma-terma PJB. Selanjutnya, di bawah seksyen 15.01(c) PPS, KGL dan TSL telah berjanji untuk mendapatkan persetujuan bertulis bank terlebih dahulu sebelum mereka melaksanakan hak mereka untuk menamatkan PJB. Setelah mempertimbangkan PPS dan khususnya seksyen-seksyen 13.01, 14.01 dan 15.01 didapati bahawa niat pihak-pihak adalah jelas, iaitu pelaksanaan terma-terma PJB tersebut terletak pada KGL dan TSL dan bukannya pada plaintif kedua (lihat perenggan 11–13 & 15).

(2) Daripada keterangan yang dikemukakan menunjukkan bahawa plaintif kedua telah memberikan KGL dan TSL persetujuan secara lisan untuk menamatkan PJB tersebut. Oleh itu, tiada sebab bagi defendan untuk bersungut kerana PPS merupakan perjanjian antara KGL, TSL dan plaintif kedua dan defendan bukanlah pihak bagi kontrak-kontrak tersebut. Apapun, tindakan plaintif kedua menghentikan semua kemudahan kredit kepada KGL dan TSL untuk pembayaran kepada defendan berikutan PJB tersebut selepas penamatannya adalah konsisten dengan persetujuannya atas pembatalan PJB tersebut. Plaintif kedua juga bergabung dengan KGL dan TSL untuk menjadi pihak dalam guaman-guaman ini terhadap defendan (lihat perenggan 16).

(3) Hujahan defendan bahawa penamatan tersebut akan memaksa mereka menghentikan projek tersebut adalah tidak benar kerana walaupun penamatan PJB oleh KGL dan TSL, defendan tidak menghentikan projek tersebut tetapi meneruskan pembangunannya secara perlahan-lahan. Persoalan polisi awam tidak berbangkit dalam kes-kes ini di mana kewajipan kontrak mengkehendaki pemaju menyiapkan projek tersebut dalam masa yang ditetapkan dan tidak memungkiri kontrak tersebut dari segi undang-undang. Defendan tidak harus dibenarkan bersembunyi di sebalik polisi awam untuk menggagalkan tuntutan-tuntutan KGL dan TSL apabila mereka telah memungkiri seksyen 6.08 PJB tersebut. Fakta bahawa pembeli-pembeli lain bagi unit-unit dalam projek tersebut akan terjejas bukanlah kesilapan KGL dan TSL tetapi kerana kegagalan defendan melaksanakan kewajipan-kewajipan mereka (lihat perenggan 17).

(4) Apabila masa merupakan intipati kontrak, seperti yang diakui oleh defendan dan seperti yang ternyata dalam seksyen 6.08 PJB, maka haruslah dianggap sebagai terma asasi. Kemungkiran terhadap asas sesuatu kontrak mestilah dilihat sebagai kemungkiran yang serius.

Selanjutnya s 56 Akta terpakai ke atas keadaan kes-kes ini dan akan menjadikan PJB tersebut boleh batal atas pilihan KGL dan TSL. Oleh itu, KGL dan TSL berhak membatalkan PJB tersebut. Malah, tiada keperluan dalam s 56 Akta untuk KGL dan TSL untuk menunggu masa yang sesuai sebelum mereka boleh menamatkan kontrak-kontrak tersebut. Oleh itu, hujahan defendan bahawa KGL dan TSL harus memberi masa yang wajar setelah tarikh penyiapan tersebut tamat sebelum mereka membatalkan PJB tersebut tidak bermerit (lihat perenggan 19, 21 & 25).

(5) Penyiapan premis tersebut seperti dalam PJB adalah kewajipan defendan semata-mata dan tuan punya tanah tersebut hanyalah membenarkan tanahnya dimajukan. Oleh itu, KGL dan TSL boleh menyaman defendan dan bukannya tuan punya tanah, berikutan PJB tersebut. Jika defendan mendakwa bahawa tuan punya tanah bertanggungan bersama-sama, ia boleh mengambil tindakan prosiding pihak ketiga terhadap tuan punya tanah, yang mana ia tidak berbuat sedemikian (lihat perenggan 26).

(6) KGL dan TSL memplidkan dan membuktikan fakta tentang wang yang telah dibayar dan ditanggung yang mana mereka telah alami kesan daripada kemungkiran PJB tersebut oleh defendan. Lantaran itu tidak perlulah menangguhkan penaksiran ganti rugi ke tarikh yang lain (lihat perenggan 28).]

**Notes**

For cases on breach, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 5060–5066.

**Cases referred to**

*Chye Fook & Anor v Teh Teng Seng Realty Sdn Bhd* [1989] 1 MLJ 308, HC (refd)

*Gan Hwa Kian & Anor v Shencourt Sdn Bhd* [2007] 4 MLJ 554; [2007] 3 CLJ 538, HC (folld)

*Hipparion (M) Sdn Bhd v Chung Khiaw Bank Ltd* [1989] 2 MLJ 149, SC (distd)

*Hoenig v Issacs* [1952] 2 All ER 176, CA (refd)

*Kang Yoon Mook Xavier v Insun Development Sdn Bhd* [1995] 2 MLJ 91, HC (refd)

*Kredin Sdn Bhd v YTF Investments Sdn Bhd* [1998] 1 MLJ 46, CA (distd)

*Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd* [1984] 2 MLJ 268, FC (distd)

*Sapiahtoon v Lim Siew Hui* [1963] MLJ 305 (refd)

*Sim Chio Huat v Wong Ted Fui* [1983] 1 MLJ 151, FC (refd)

*Stocznia Gdanska SA v Latvian Shipping Co & Ors* [1998] 1 All ER 883, HL (refd)

*Thomas a/l Iruthayam & Anor v LSSC Development Sdn Bhd* [2005] 4 MLJ 262; [2005] 6 CLJ 141, HC (refd)
*Yeow Kim Pong Realty Ltd v Ng Kim Pong* [1962] MLJ 118, PC (refd)

**Legislation referred to**
Civil Law Act 1956 s 4(3)
Contracts Act 1950 ss 56, 56(1), 76
Strata Titles Act 1985

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*M Thayalan (Thayalan & Associates) for the defendant.*

**Chew Soo Ho JC:**

INTRODUCTION

**[1]** These three civil suits are tried jointly upon the request and consent by the parties herein on ground that all the three suits involved the same parties: KGL Realty Sdn Bhd (the first plaintiff in CS 22–322 of 2000) and TSL Properties Sdn Bhd (the first plaintiff in CS 22–323 of 2000 and CS 22–324 of 2000) ('the first plaintiff') are companies where all the shareholders are the same, the subject matter is the same in that the first plaintiff in all three suits had purchased a total of 12 parcels of commercial units in the same property development of the defendant known as Asas Parade and the second plaintiff or the initial Hock Hua Bank that subsequently merged with the second plaintiff was the bank which provided the credit facilities to all the first plaintiff for the purchase of the 12 parcels of the said lots in Asas Parade; the witnesses are also the same.

FACTS OF THE CASE

**[2]** Pursuant to a joint venture agreement dated 3 March 1995 between the defendant and Dyner Resources Sdn Bhd, the landowner, the defendant as developer was allowed to develop the lands of the landowner into a commercial project known as Asas Parade and to sell the parcels comprised in the buildings to be erected to purchasers. The first plaintiff had entered into 12 sales and purchase agreements ('SPA') with the defendant as vendor and the landowner to buy 12 parcels of the commercial units in the said Asas Parade to be constructed by the defendant as follows:

| No. | SPA | Parcel | Purchase Price (RM) |
|---|---|---|---|
| 1 | SPA dated 15.4.1996 | No. 5 1st Floor | 196,000.00 |
| 2 | SPA dated 15.4.1996 | No. 6 1st Floor | 272,000.00 |
| 3 | SPA dated 14.3.1996 | No. 30 Ground Floor | 223,000.00 |

| | | | |
|---|---|---|---|
| 4 | SPA dated 6.2.1996 | No. 31 Ground Floor | 223,000.00 |
| 5 | SPA dated 6.2.1996 | No. 3 Ground Floor | 295,000.00 |
| 6 | SPA dated 6.2.1996 | No. 4 Ground Floor | 296,000.00 |
| 7 | SPA dated 6.2.1996 | No. 29 Ground Floor | 298,000.00 |
| 8 | SPA dated 14.3.1996 | No. 63 Ground Floor | 201,000.00 |
| 9 | SPA dated 6.2.1996 | No. 64 Ground Floor | 201,000.00 |
| 10 | SPA dated 14.3.1996 | No. 149 Ground Floor | 184,000.00 |
| 11 | SPA dated 6.2.1996 | No. 150 Ground Floor | 184,003.00 |
| 12 | SPA dated 14.3.1996 | No. 165 Ground Floor | 394,003.00 |

**[3]** Although the landowner was a party in the aforesaid SPA, all the material terms, conditions, covenants and obligations contained in aforesaid SPA of the said parcels were stipulated and contracted to be performed between the defendant as vendor and the first plaintiff as purchasers.

**[4]** By a loan agreement cum assignment ('LACA') dated 7 December 1996 (CS No 22–322 of 2000) (the LACA in the other two suits contained the same clauses), the first plaintiff, with the consent of the defendant as vendor of the aforesaid parcels and the landowner, had assigned all the first plaintiff's rights, title and interest in respect of the SPA and the four parcels purchased to the then Hock Hua Bank Bhd, now the second plaintiff, by way of security for banking facilities in a principal amount of RM731,200 (term loan of RM431,200 and overdraft of RM300,000 with interest at 1.75%pa above base lending rate) (in Suit No 22–322 of 2000); RM820,000 (overdraft with interest at 1.75%pa above base lending rate) (in Suit No 22–323 of 2000) and RM820,000 (term loan at 1.75%pa above base lending rate) (in Suit No 22–324 of 2000) granted by the bank to the first plaintiff to part finance the payment of the purchase price for each of the respective parcels under each respective SPA.

**[5]** Pursuant to clause section 6.08 of the respective SPA which provides that the defendant shall effect the completion of the subject parcels within a period of three (3) years from the date of the respective agreements, the defendant did not complete and deliver vacant possession by the completion date as provided of all the aforesaid parcels purchased by the first plaintiff. By reason of the said breach, the first plaintiff with the consent of the second plaintiff rescinded the SPA vide notices of termination dated 23 June 1999 and demanded from the defendant the refund of all monies paid by the first plaintiff and by the second plaintiff on behalf of the first plaintiff with interest and solicitors' costs as damages.

**[6]** The defendant conceded that the respective parcels in the Asas Parade purchased by the first plaintiff in these suits were not completed within the three years period. The defendant contended that the SPA clearly provided for indemnity at the rate of 10%pa of the purchase price calculated from day to day commencing immediately after the date fixed for completion if the property was not delivered after the completion date as stipulated in section 7.19 in the respective SPA and the defendant was prepared to pay them. The defendant did not accept or agree to the said rescission. In addition, the project was not abandoned though progressing very slowly. The first plaintiff had bought a total of 21 parcels out of the 80 parcels in Asas Parade but they rescinded 12 SPA in these three suits but not the rest. The defendant contended that the first plaintiff's conduct was inconsistent and the rescission also affected other purchasers who wanted to complete the agreements. By rescinding the SPA, The first plaintiff could force the defendant to abandon the project. However, although the defendant was suffering great losses, they completed the project and obtained the certificate of fitness for occupation on 28 October 2009.

ISSUES RAISED

**[7]** The court has deduced the issues raised by both parties to the following:

(a) Whether the first plaintiff have the right in law or under the SPA to rescind the said SPA on 23 June 1999;

(b) Whether the termination notices issued by the first plaintiff to the defendant were valid and in compliance with section 15.01(c)(i) of the loan agreement cum assignment (LACA) between Hock Hua Bank and the first plaintiff;

(c) Whether the defendant was also able to fulfill their obligations under the SPA;

(d) Whether the failure to name the landowner, Dyner Resources Sdn Bhd as a party in the suits is fatal to the plaintiffs' cases; and

(e) Whether the plaintiffs are entitled to the relief sought.

EVALUATION AND FINDINGS

**[8]** The facts of these three cases are basically not disputed that the first plaintiff had bought for the purposes of these three cases 12 parcels of commercial lots in Asas Parade, a complex developed by the defendant on the Dyner Resources Sdn Bhd's (the landowner's) lands. The respective dates of purchase, the number of parcels, the prices of the parcels and the execution of the SPA as listed above are not in dispute. The issues in contention by both parties are ostensibly questions of law for the determination of this court.

From the deduced five issues above, this court will deal with the first (a) and second (b) issues together as they are intertwined.

*The first issue (a): Whether the first plaintiff had the right to rescind the contracts; and the second issue (b): Whether the first plaintiff had the capacity to issue the notices of rescission and henceforth whether the said notices were valid*

**[9]** The defendant contended that by the loan agreement cum assignment (LACA) (exh P2 in Civil Suit No 22–322 of 2000; LACA for the other two suits contained the same clauses), the first plaintiff had, vide section 13 therein, assigned their rights, titles to and interest in the properties to the bank absolutely. Therefore, the defendant argued that the first plaintiff had no locus standi to issue the rescission notices since the assignment was absolute; it should be the bank which had the capacity to pursue the action against the defendant. In support, the defendant cited the Federal Court case of *Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd* [1984] 2 MLJ 268; *Hipparion (M) Sdn Bhd v Chung Khiaw Bank Ltd* [1989] 2 MLJ 149 (SC); and *Kredin Sdn Bhd v YTF Investments Sdn Bhd* [1998] 1 MLJ 46 (CA) which held, inter alia, that if the deed was an absolute assignment and not purporting to be by way of charge only within the meaning of s 4(3) of the Civil Law Act 1956, the assignee should have all the rights, title and interest of the assignor in the SPA. Hence, the defendant contended that it should be the bank who would be entitled to institute the action to enforce the agreements against the defendant and not the first plaintiff. In *Nouvau Mont Dor* which was followed by *Hipparion and Kredin*, His Lordship Seah FJ in delivering the judgment of the Federal Court said at p 270:

> It is plain that in every case of this kind, all the terms of the instrument must be considered; and *whatever may be the phraseology adopted in some particular part of it, if, on consideration of the whole instrument, it is clear that the intention was to give a charge only, then the action must be in the name of the assignor*. While, on the other hand, if it is clear from the instrument as a whole that the intention was to pass all the rights of the assignor in the debt or chose in action to the assignee, then the case will come within s 25 and the action must be brought in the name of the assignee (Mathew LJ in *Hughes v Pump House Hotel Co Ltd*). (Emphasis added.)

**[10]** From the above statement of law of the Federal Court, the consideration must be on the whole instrument and not just a clause within the instrument. In *Nouvau Mont Dor and Hipparion* the pertinent clause or term of the assignment reads as follows:

> That in consideration of the bank having agreed to grant the loan the assipor as beneficial owner hereby assigns absolutely to the bank all his rights tie and interest in and to the said property and under the said sales agreement and the full benefit granted thereby and all stipulations therein contained *and all remedies for enforcing the same*. (Emphasis added.)

**[11]** Basing on the above term of the agreements in *Nouvau Mont Dor and Hipparion*, the Federal Court and Supreme Court respectively held that the deed was an absolute assignment and that the bank as assignee should enforce the action. Similarly, in *Kredin*, the Court of Appeal reiterated the same principle of law that if at all there was a cause of action to institute the action to enforce the agreement, it would be the bank who would be entitled to do so and not Kredin as cl 1 of the deed of assignment therein made this clear when together with its rights, title and interest, Kredin also assigned 'all remedies for enforcing' to the bank. In brief, in all the three cases cited, the term of the deed expressly stated that the borrower assigned all remedies for enforcing to the bank. In the instant cases before this court, section 13.01 provides:

> In consideration of the Facility granted to the Borrower upon the terms and conditions contained in this Agreement, the Borrower as beneficial owner hereby absolutely assigns all of the Borrower's rights and title to and interest whatsoever in the Property including all rights and interest of the Borrower in the Sale and Purchase Agreement to the Bank.

**[12]** From this term in the loan agreement cum assignment (LACA), it is undoubted that the bank was not assigned the rights to enforce all remedies as in the three authorities quoted by the defendant above. Section 13.01 is totally silent on this right. Indeed, the bank had divested itself from all obligations or liabilities under the SPA including the enforcement of all remedies but to confine itself to making progress payments out of the facilities granted under the LACA while the first plaintiff were to remain liable under the SPA to observe and perform all of the conditions and obligations therein including filing of any claim or taking any other action to enforce the terms of the SPA. This can be seen in section 14.01 therein as follows:

> It is expressly agreed, however, that notwithstanding anything contained herein to the contrary, the Borrower shall remain liable under the Sale and Purchase Agreement to observe and perform all of the conditions and obligations therein provided to be observed and performed by him, and the Bank shall have no obligation or liability under the Sale and Purchase Agreement by reasons of or arising out of this Assignment, nor shall the Bank be required or obligated in any manner to observe or perform any of the conditions or obligations of the Borrower under or pursuant to the Sale and Purchase Agreement *(except to make progress releases out of the proceeds of the Facility under the terms and conditions provided in Part I of this Agreement) or to present or file any claim, or to take any other action to enforce the terms of the Sale and Purchase Agreement*. (Emphasis added.)

**[13]** The covenants in section 15.01(c) in the same LACA further strengthen the fact that the right to terminate the SPA was on the first

plaintiff; that was why they could covenant to have prior consent of the bank in writing before they exercised their right to terminate the SPA. Section 15.01(c) reads:

> The Borrower hereby covenants with the Bank that he:
>
> (c) will not without the prior consent of the Bank in writing,
>
> (i) terminate or agree to terminate the Sale and Purchase Agreement.

**[14]** It is obvious that the first plaintiff as borrower had been given that right to terminate or to enforce the SPA as expressed in section 14.01 to be notwithstanding anything contained in the LACA to the contrary which undoubtedly referred to section 13.01 thereby qualifying the absolute assignment as provided in section 13.01. This is further consistent with the fact that first plaintiff were able to covenant with the bank not to terminate the SPA without the prior written consent of the bank as in clause section 15.01(c)(i). It is through the rights conferred upon the first plaintiff vide section 14.01 that they were able to so covenant not to terminate the SPA without the written consent of the bank, the second plaintiff, vide section 15.01(c)(i).

**[15]** After due consideration of the whole LACA and in particular the terms under section 13.01,14.01 and 15.01(c)(i) therein, this court finds that the intention of the parties was explicit in that the enforcement of the terms of the SPA would be vested in the hands of the first plaintiff and not with the bank which would only be obligated to make progress releases of the proceeds of the facilities under the terms and conditions provided in Part I of the LACA as manifested in clause section 14.01 above. In the circumstances, this court holds that the term in section 13.01, though with the caption of 'absolute assignment' and the words 'asbolutely assigns', differs from the term expressed in *Nouvau Mont Dor, Happarion and Kredin* as this particular clause specifically or intentionally excluded the bank's absolute rights to enforce all remedies under the SPA. The LACA in the instant cases are therefore consistent with a charge as provided in clause section 7.01 within the meaning of s 4(3) of the Civil Law Act 1956. Following *Nouvau Mont Dor*, if on the consideration of the whole instrument, it is clear that the intention was to give a charge only as in these instant cases, then the action must be in the name of the assignor. Consequently, the first plaintiff as assignors had the locus standi to file these suits against the defendant.

**[16]** On section 15.01(c)(i) in the LACA, the defendant contended that there was no consent in writing being produced to establish that this term had been complied with by the first and second plaintiffs. From the evidence before this court, PW1, the second plaintiff's manager, and PW2, the director

of the first plaintiff, had testified that the second plaintiff had given the consent, though not in writing, to the first plaintiff to terminate the SPA. Learned counsel for the plaintiffs submitted that there is no cause for the defendant to complain as the LACA were contracts between the first plaintiff and the second plaintiff and the defendant was not privy to these contracts. Parties to the contract could agree to waive the requirement of consent in writing as in these three cases where oral consent was given by the second plaintiff to the first plaintiff. Learned counsel further submitted that the conduct of the second plaintiff in stopping all releases of the first plaintiff's credit facilities towards any payment to the defendant in relation to the aforesaid SPA after the termination of the said SPA, was consistent with the second plaintiff having given their consent to the first plaintiff's rescission of the SPA. This court finds merit in this submission. This fact is indeed further strengthened by the second plaintiff joining action with the first plaintiff to be a party in these suits against the defendant. Consent from the second plaintiff to the first plaintiff to terminate the SPA and further action is unequivocal.

**[17]** Having determined the capacity of the first plaintiff, the ensuing question is whether the first plaintiff could terminate the SPA in these cases. The defendant submitted that the first plaintiff could not rescind unless it was for serious breach citing Treitel *The Law of Contract* (10th Ed) 1999, *Stocznia Gdanska SA v Latvian Shipping Co & Ors* [1998] 1 All ER 883 (HL); *Hoenig v Issacs* [1952] 2 All ER 176 (CA) and *Sapiahtoon v Lim Siew Hui* [1963] MLJ 305. It is a fact that pursuant to the clause under section 6.08 of the SPA, the date of completion of the premises purchased by the first plaintiff shall be within three (3) years from the date of the SPA as listed above and that the defendant had failed to comply with this term. This fact is undisputed. The same section 6.08 also provided the situations where the defendant was not liable for any delay, that is, when the delay was occasioned by strike or combination of workmen, lock out, civil commotion, force majeure, exceptionally inclement weather, loss or damage by fire, flood or tempest or other like cause beyond the defendant's control. However, the defendant had never claimed the delay in these cases to be occasioned by any of the above reasons. What the defendant had contended was that it was due to economic downturn which caused the delay. This ground was not contracted to be one of the grounds which justified the defendant's delay to complete the premises within three years in section 6.08 above. The defendant further submitted that first plaintiff should not have terminated the SPA because section 7.19 in the SPA had provided indemnity for the delay in completion; termination of the SPA in the light of section 7.19 would have forced the defendant to abandon the project. They also argued that it is against public policy for the first plaintiff to have terminated the SPA as such termination would have affected other purchasers who wanted to have the building completed. This argument is in fact not true as the fact in these

instant cases showed that in spite of the termination of the SPA by the first plaintiff, the defendant did not abandon the project but proceeded to build albeit very slowly and complete the buildings in 2001 with the certificate of fitness for occupation obtained on 28 October 2009. They had not been forced to abandon the project even after the first plaintiff had rescinded the SPA. On the question of public policy, this court is of the view that the question of public policy does not arise in these cases where the contractual obligation required the developer to complete the project within the stipulated and agreed time frame and not to breach the contract in law. Public policy would dictate parties to comply with their obligations under the law. The defendant cannot be allowed to hide in the cocoon of public policy to defeat the claims of the plaintiffs when the defendant had themselves breached section 6.08 of the SPA. If at all the interests of the other purchasers were affected whether adversely or otherwise, it would be the default of the defendant in the performance of their obligations under the SPA and not the fault of the first plaintiff. It would therefore be unjust for the defendant to attach any blame on the first plaintiff.

**[18]** Section 7.14 in the SPA provided as follows:

> Time wherever mentioned in this Agreement shall be of the essence of this contract.

**[19]** The defendant through the evidence of their witness SD1 had categorically admitted this clause to be a fundamental term in the SPA. On this admission, the plaintiffs submitted that they were entitled to rescind or terminate the SPA pursuant to s 56(1) of the Contracts Act 1950 and claim damages when the defendant had failed to complete the premises within the three years as stipulated in section 6.08 in the said SPA. The plaintiffs cited *Halsbury's Laws of England* (4th Ed) 1974 Vol 9 p 370 para 538 where it laid down the general rule that 'where one party to a contract has committed a serious breach by a defective performance or by repudiating his obligations under the contract, the innocent party will have the right to rescind the contract; that is to treat himself as discharged from the obligation to tender further performance, and to sue for damages for any loss he may have suffered as a result of the breach. The breach itself does not terminate the contract, the innocent party having the right to elect to treat the contract as continuing or to terminate it by rescission'. The plaintiffs also cited *Chye Fook & Anor v Teh Teng Seng Realty Sdn Bhd* [1989] 1 MLJ 308; *Kang Yoon Mook Xavier v Insun Development Sdn Bhd* [1995] 2 MLJ 91; *Gan Hwa Kian & Anor v Shencourt Sdn Bhd* [2007] 4 MLJ 554; [2007] 3 CLJ 538; and *Thomas a/l Iruthayam & Anor v LSSC Development Sdn Bhd* [2005] 4 MLJ 262; [2005] 6 CLJ 141 in relation to the application of s 56(1) of the Contracts Act 1950. When time is of the essence of the contract to be a fundamental term of the SPA as

admitted by the defendant, clause section 6.08 which provided for the completion date within three years from the dates of the SPA must be taken as a fundamental term. The breach of a fundamental term of a contract must be construed to be a serious breach; see *Sim Chio Huat v Wong Ted Fui* [1983] 1 MLJ 151 (infra). This court therefore finds no necessity to discuss the text and authorities on this point as submitted above by the defendant.

**[20]** Section 56(1) of the Contracts Act 1950 provides:

> 56(1) When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

**[21]** This court finds that s 56(1) of the Contracts Act 1950 is applicable in the circumstances of these cases before this court and it renders the SPA voidable at the option of the first plaintiff. Indeed, the rules contained in s 56 of the Contracts Act 1950 are not different from the position arrived at in common law. In *Yeow Kim Pong Realty Ltd v Ng Kim Pong* [1962] MLJ 118, the position is that if in a contract in which time is of the essence, a party fails to perform it by the stipulated time, the innocent party has the right to rescind the contract, or to treat it as still subsisting. In *Sim Chio Huat v Wong Ted Fui* the Federal Court held, inter alia, as follows:

> Held: (1) in this case as time was provided to be of the essence of the agreement, the stipulated periods within which the houses had to be delivered to the respondent became an essential condition of the agreement. Failure by the appellant to fulfill this condition entitled the respondent to have an option of treating the agreement either (a) as having been repudiated and dismissing the appellant or (b) as still continuing.
>
> ...

**[22]** This principle of law is clearly envisaged in s 56(1) of the Contracts Act 1950 as well as common law disregarding whatever facts of the case may be.

**[23]** On the existence of an indemnity clause, section 7.19 in the SPA for which the defendant agreed to pay the liquidated damages, this court would like to echo what has been held in *Gan Hwa Kian & Anor v Shencourt Sdn Bhd* where His Lordship Abdul Malik Ishak J (as he then was) held as follows:

> ... The plaintiffs' entitlement to liquidated damages did not take away their right to rescind. Further, time was not waived by the plaintiffs and the defendant did not give any credible assurances as to when the subject property would be completed.

**[24]** For the reasons deliberated above, this court holds that the plaintiffs are entitled under s 56(1) of the Contracts Act 1950 to rescind the SPA when the defendant had breached the fundamental terms of the contract in section 6.08 read with section 7.14 of the said SPA.

**[25]** In view of the aforesaid findings of this court, the *third issue (c) of whether the defendant was able to fulfill their obligations under the SPA*, to this court, is non-issue when the breach of section 6.08 read with section 7.14 had occurred. This court finds that there is no duty for the plaintiffs to wait for any time longer than necessary once they have elected to treat the contracts as void. This court does not agree with the defendant's argument that the plaintiffs would have to wait for a reasonable time after the due dates for completion of the premises before they could exercise their rights to rescind the SPA. There is no such requirement within s 56(1) of the Contracts Act 1950 that the plaintiffs must wait for a reasonable time before they could terminate the contracts. The option is with the plaintiffs and once they had decided to terminate the SPA after the completion date when the defendant could not fulfill ie the occurrence of the breach, the plaintiffs would be entitled to terminate the SPA as time was of the essence of the contract. The defendant knew and ought to have realised that when they agree to complete the premises within the stipulated three years, that was the maximum time allotted to them and that they must complete by that time frame. The fact that the SPA do not contain the extension of time clause coupled with the fact that section 7.14 provided that time is the essence of the contract make it affirmative that the defendant must complete within the given time and no more. Hence, the contention that reasonable time ought to have been given by the plaintiffs to the defendant after the expiration of the completion date before they rescind the SPA holds no merit. Moral consideration must be distinguished from the legal obligation and legal right of the parties. In addition, there was no evidence from the defendant to the plaintiffs at the material time that they had given an assurance to the plaintiffs that they could complete at a stated time and asked for the consent of the plaintiffs to extend the time. Evidence showed that the defendant was in fact very slow in their work progress and only managed to obtain the certificate of fitness for occupation of the said premises on 28 October 2009, some ten (10) years after the completion dates of the 12 parcels purchased by the first plaintiffs. Even taking into consideration only of the practical completion of the said premises which the defendant alleged to be in 2001, it was still two (2) years after the completion dates. The breach had already been committed.

**[26]** Turning to the *fourth issue (d) of whether the failure to name the landowner as a party is fatal to the plaintiffs' cases*, the defendant submitted that the landowner is a party to all the SPA, all the assignments and under the Strata Titles Act 1985, all the obligations are on the 'original proprietor' ie the

landowner. Therefore the landowner must be a party to all the SPA. In these cases before this court, the breach of section 6.08 read with section 7.14 of the SPA was by the defendant as the 'vendor' as vividly expressed in section 6.08. The completion of the premises in the SPA was solely the obligations of the defendant. The landowner merely allowed their lands to be built. Their role in the LACA was merely giving their consent for the assignment but was not privy to the contract. It is also implicit in the SPA that all the material terms, conditions, covenants and obligations contained therein were stipulated and contracted to be performed between the defendant as the vendor and the first plaintiff as the purchaser. This court is of the view that in the circumstances, the plaintiffs could sue the defendant and not the landowner pursuant to the said SPA. In any event, if the defendant alleged that the landowner is jointly liable, there is nothing to bar the defendant from taking a third party proceeding against the landowner. No such proceeding was taken out. The Strata Titles Act 1985 is not relevant to the issues before this court as the first plaintiff had rescinded the contracts and it would not involve the question of the issuance, registration etc of the strata titles. The role of the landowner pertaining to strata titles is premature.

*The fifth issue (e): Whether the plaintiffs are entitled to the relief sought*

**[27]** In submission, learned counsel for the plaintiffs submitted that the plaintiffs claimed from the defendant the monies paid by the plaintiffs towards the purchase price of the 12 parcels of the commercial units in Asas Parade amounting to RM685,500 and interest paid to the bank as at 30 June 2000 of RM134,802.31 (CS No 22–322 of 2000), RM804,250 plus interest paid to the bank of RM147,537.31 (CS No 22–323 of 2000) and RM656,200 plus interest paid to the bank of RM137,725.61 (CS No 22–324 of 2000), interest on the total of the principal and interest sums at 10%pa or at any rate this court shall deem fit from 1 July 2000 to the date 31 October 2009 of 112 months and the fees paid to the solicitors for the proceedings and other relief. Learned counsel for the defendant contended that what the plaintiffs are claiming are in fact for *restitutio in integrum* which they are not entitled but damages only pursuant to s 76 of the Contracts Act 1950 which provides:

> 76 A person who rightly rescinds a contract is entitled to compensation for any damage which he has sustained through the non-fulfillment of the contract.

**[28]** Learned counsel for the defendant submitted there is a distinction between restitution and damages and he prayed that a date for assessment of damages should be fixed if the court were to allow the plaintiffs' claims. Learned counsel for the plaintiffs asserted that the above quoted claims represent the damages suffered by the first plaintiff. Having considered the

arguments of both parties, this court is of the view that even if the court were to allow the plaintiffs' claim and schedule a date for the assessment of damages, the plaintiffs would have put forward the same claims as asserted by the learned counsel for the plaintiffs. There is therefore no necessity to do as requested by learned counsel for the defendant. The plaintiffs have pleaded and proved those facts of the monies that they had paid and incurred for which they suffered as a consequence of the breach of the SPA by the defendant that they had terminated and the fact that the defendant had not challenged those payments made or incurred by the first plaintiff renders it unconceivable that there should be another date to assess the damages which are the same. *In Gan Hwa Kian & Anor v Shencourt Sdn Bhd* the High Court held, inter alia, that 'As the defendant had breached its obligation under the agreement to deliver the property on time, the plaintiffs were entitled to the refund of all the moneys paid and damages for the non-fulfillment of the contract'. It appears that the refund of all monies paid is construed as compensation under s 76 of the Contracts Act 1950. This court will accordingly decide on this issue without having to adjourn to another date for the assessment of damages.

CONCLUSION

**[29]** Having considered all evidence and submissions by both parties in these three suits, this court hereby orders judgment in favour of the plaintiffs in the following:

(a) Civil Suit No 22–322 of 2000

Paragraph 16 of the amended statement of claim:

Prayers (a), (b), (c) and (e) are allowed.

Prayers (f) is allowed as amended as follows:

> Payment of interests to accrue on the sum of RM685,500 at the rate of 6%pa from 23 June 1999, the date of rescission to the date of judgment.

Prayer (g) is allowed as amended as follows:

> Payment of RM11,213.35 being solicitors' fees, costs and expenses in the purchase and financing of the parcels.

(b) Civil Suit No 22–323 of 2000

Paragraph 16 of the amended statement of claim:

Prayers (a), (b), (c) and (e) are allowed.

Prayer (f) is allowed as amended as follows:

> Payment of interest to accrue on the sum of RM804,250 at the rate of 6%pa from 23 June 1999, the date of rescission to the date of judgment.

Prayer (g) is allowed as amended as follows:

> Payment of RM4,000 being solicitors' fees, costs and expenses in the purchase and financing of the parcels.

(c) Civil Suit No 22–324 of 2000

Paragraph 16 of the amended statement of claim:

Prayers (a), (b), (c) and (e) are allowed.

Prayer (f) is allowed as amended as follows:

> Payment of interest accrue on the sum of RM656,200 at the rate of 6%pa from 23 June 1999, the date of rescission to the date of judgment.

Prayer (g) is allowed as amended as follows:

> Payment of RM20,331 being solicitors' fees, costs and expenses in the purchase and financing of the parcels.

**[30]** It is further ordered that interest at the rate of 8%pa to be payable on the respective sums of RM685,500, RM804,250 and RM656,200 in all the above three prayers (f) from the date of judgment to the date of realisation.

**[31]** It is lastly ordered that costs of RM10,000 is awarded to the plaintiffs for all the three civil suits.

*Plaintiffs' application allowed with costs.*

Reported by Kohila Nesan